IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1969

No. 1244

A. T. GORDON, *et al.*, *Petitioners*,

v.

GRANVILLE H. LANCE, *et al.*, *Respondents*.

BRIEF OF THE ATTORNEY GENERAL OF THE STATE OF WASHINGTON AND G. KEITH GRIM AS AMICI CURIAE ON BEHALF OF PETITIONERS HEREIN

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The Attorney General of the State of Washington and G. Keith Grim join to appear as *amici curiae* and have filed herewith the written consent of all parties to this action in accordance with Rule 42 of the Rules of the Supreme Court of the United States. This brief is submitted in support of the position of the petitioners.

INTEREST OF G. KEITH GRIM AND THE ATTORNEY GENERAL OF THE STATE OF WASHINGTON

The State of Washington, and all its citizens, have a direct and substantial interest in the outcome

of this action because of the similarity of the West Virginia constitutional provisions and those of the Washington Constitution and implementing statutes. Article VII, Section 2, and Amendment 17 to the Washington Constitution provide that the aggregate of tax levies upon real and personal property by all taxing districts shall not exceed 40 mills on the dollar of assessed valuation in any year, but that the imposition of levies in excess of the 40 mill limitation may be authorized by an affirmative vote of sixty percent of the voters of any taxing district. Article VIII, Section 6, and Amendment 27 to the Washington Constitution require taxing districts to obtain a sixty percent affirmative vote before becoming indebted in excess of specified percentages of the value of taxable real property in the taxing district. Clearly this Court's disposition of the present action will directly affect the validity of these provisions.

The constitutionality of the supermajority laws for taxing measures in Washington was questioned in *Thurston v. Greco*, an action arising from the failure of a special levy and a bond authorization in the City of Tacoma to receive a 60% affirmative vote although they received more than a bare majority. The State of Washington, by its Attorney General, was a party to that litigation and urged that the Wash-

ington Supreme Court uphold these rules. It was joined in this position by G. Keith Grim, appearing as *amicus curiae* on behalf of defendants therein. On September 24, 1970, the Washington Supreme Court, in a 7-1 opinion, upheld the supermajority vote requirements of Washington's taxing rules. *Thurston v. Greco*, 78 W.D.2d 421, ... P.2d ..... (1970).*

The people of the State of Washington have long held and often affirmed their determination to limit property taxation as a means of generating governmental revenue. They have implemented this determination by the maintenance of a ceiling upon the imposition of such taxation, which ceiling should be overridden only upon a convincing showing to the voters of a taxing district that levies in excess of that ceiling were essential. Such a convincing showing of need would have been made, said the people, if three-fifths of their number voting at a tax authorization election approved the imposition of additional property taxation. The State of Washington, through its Attorney General, and G. Keith Grim join in sub-

*Two cases involving the validity of these same supermajority rules, but involving the failure of taxing measures to receive a 60% majority in other taxing districts, were heard in May, 1970 by a three judge federal panel. *Gaudette v. Peterson*, No. 3328 (E.D. Wash., N.D.); *Nelson v. Evans*, No. 8633 (W.D.Wash., N.D.). In an opinion rendered June 3, 1970, this panel stayed proceedings pending the state court determination in *Thurston v. Greco* and noting that, in any event, this Court's determination in the present suit would precede any review of the panel's determination in the cases before it.

mitting this brief as *amici curiae* in support of the position of the petitioners in their effort to uphold the constitutionality of such measures as valid tax-limitation devices.

SUMMARY OF ARGUMENT

The West Virginia supermajority vote requirements at issue in this case, like the similar Washington provisions, do not discriminate against "persons" as proscribed by the equal protection clause. Rather, if anything, they discriminate against the passage of a taxing measure when submitted by a taxing district for popular approval. This type of discrimination, assuming it can be termed as such, is not within the ambit of equal protection considerations.

If this Court finds these supermajority vote provisions do effect a classification of "persons," it must then determine whether such a classification is reasonably and rationally related to the achievement of a proper governmental purpose. Washington's experience with its supermajority vote requirements demonstrates that they are useful tools in limiting the onerous burdens which may be imposed on property owners by the unrestricted access of government to property taxation. In permitting property taxation in certain instances only when a meaningful

plurality of the voters have been convinced by a taxing district of the necessity of such additional levies, the supermajority vote provisions serve as valid and effective, and constitutional, tax-limitation devices.

ARGUMENT

In reaching its decision in this case the Court first must determine whether the supermajority vote requirements here at issue fall within the ambit of the equal protection clause of the 14th Amendment—that is, whether they effect a classification of "persons" as required by that clause. Secondly, if the first determination is in the affirmative, the Court must consider the test to be applied to ascertain whether the classification effected by the supermajority vote requirements is constitutionally acceptable—that is, whether it must be proven necessary to promote a compelling state interest or merely rationally related to the achievement of a permissible state objective. In order finally to examine these supermajority vote requirements in the light of the legal standard thus selected, the history and purposes of such requirements are not only relevant but essential to the Court's deliberation. We believe, therefore, that the Court could profit in this regard from a concise summary of Washington's experience with its analogous supermajority provisions.

I. Preliminary Question—Do the Supermajority Vote Requirements Classify "Persons" as Required by the Equal Protection Clause?

It should be noted initially that the equal protection clause applies only "to any person" discriminated against by state action. The clause has traditionally been applied to situations in which there could be no doubt that certain persons were detrimentally affected by the classification being questioned. Often these classifications have resulted in a discrimination based upon such factors as race, sex, religion, property ownership or wealth. Others, such as those considered in the reapportionment decisions, discriminated against persons geographically by diluting the value of their votes in permitting malapportioned electoral districts.

These provisions on the other hand, do not constitute a classification of "persons." Without question these requirements treat each qualified voter exactly the same regardless of who he is. He can vote either in favor of or in opposition to a taxing measure. Like every other voter, he is entitled to cast one vote at that special election. His vote is counted as but one vote. These supermajority rules established by the people simply require more affirmative votes than a simple majority to validate a special tax. If there is any discrimination effected by the super-

majority requirements, it is discrimination not against "persons" but rather against the passage of an issue authorizing a taxing district to incur debt or impose levies above stated limits. But the equal protection clause concerns itself with fair treatment of people. It does not speak to discrimination against the passage of taxing issues or to political decisions. In other words, the equal protection clause does not encompass a constitutional requirement that a bare majority must suffice as to taxing propositions submitted to eligible voters for their decision.

II. The Supermajority Vote Provisions Meet the Requirements of the Equal Protection Clause if They Are Found to be Relevant to the Achievement of a Permissible Governmental Purpose.

This Court may conclude that the provisions at issue result in a classification of "persons," thus bringing them within the scope of the equal protection clause. The resolution of this question will not automatically indicate the outcome of the case. These provisions must not only classify persons but must classify them in a constitutionally impermissible manner before they can be declared invalid by this Court.

The traditional scope of the equal protection clause with regard to statutory classifications has been described as follows:

> "To be sure, the constitutional demand is not a demand that a statute necessarily apply equally to all persons. 'The Constitution does not require things which are different in fact . . . to be treated in law as though they were the same.' . . . Hence, legislation may impose special burdens upon defined classes in order to achieve permissible ends. But the Equal Protection Clause does require that, in defining a class subject to legislation, the distinctions that are drawn have 'some relevance to the purpose for which the classification is made.' " *Rinaldi v. Yeager*, 384 U.S. 305, 308-309, 16 L.Ed.2d 577, 580 (1966).

Recently, however, the Court has applied a stricter standard when considering statutory classifications touching "fundamental rights" of citizens. In such instances, the classification must be tested by "whether it promotes a compelling state interest. . . ." *Shapiro v. Thompson*, 394 U.S. 618, 638 (1969). A suggestion that the stricter "compelling state interest" test should control the decision of this Court is illustrative of the danger inherent in taking quotations from cases in this field and applying them wholly out of the context in which they were propounded and to facts wholly different from those upon which they were based.

The "compelling governmental interest" test has been applied, for example, in determining the validity of statutes affecting the right of citizens to travel freely interstate (*Shapiro v. Thompson*, 394

U.S. 618 (1969)), or of a political party to find a place on the Ohio ballot (*Williams v. Rhodes*, 393 U.S. 23 (1968)). It has most recently been applied with regard to statutes restricting the right to vote to certain groups of persons in annual school board elections (*Kramer v. Union Free School District*, 395 U.S. 621 (1969)), revenue bond elections (*Cipriano v. City of Houma*, 395 U.S. 701 (1969)) and general obligation bond elections (*City of Phoenix v. Kolodziejski*, ... U.S. ....., 26 L.Ed.2d 523 (1970)). But the Court has repeatedly held, in cases in which a fundamental right of citizens is not directly affected, that the traditional "rational relation" test will be employed in assessing the constitutional validity of a statutory classification. This point has been most lucidly established by this Court, with particular relevance to the supermajority vote requirements here at issue, in *McDonald v. Board of Election Commissioners of Chicago*, 394 U.S. 802 (1969).

In *McDonald* this Court was presented with a "voting rights" case, but after devoting much of its opinion to ascertaining the equal protection test to be applied to the facts, elected not to treat the question as one affecting a "fundamental right" of citizens. In the following language the Court rejected the contention that all classifications affecting per-

sons in their capacity as voters must meet the "compelling state interest" test of constitutional validity:

> "Such an exacting approach is not necessary here, however, for two readily apparent reasons. First, the distinctions made by Illinois' absentee provisions are not drawn on the basis of wealth or race. Secondly, there is nothing in the record to indicate that the Illinois statutory scheme has an impact on appellants' ability to exercise the fundamental right to vote. It is thus not the right to vote that is at stake here but a claimed right to receive absentee ballots." 394 U.S. at 807.

Both of the "readily apparent reasons" for not applying the stricter test in *McDonald* are also readily apparent in the instant case. The supermajority vote requirements "are not drawn on the basis of wealth or race." Likewise, they do not have "an impact on [respondents'] ability to exercise the fundamental right to vote," more specifically defined to mean that the statutes "do not themselves deny [respondents] the exercise of the franchise . . ." The provisions here in issue do not deny the exercise of the franchise to any voter but merely set the plurality necessary for the adoption of a taxing measure when submitted for popular approval. Since neither factor was present in the challenged Illinois statute, "the more traditional standards" of the rational relation test were applied. The validity of the West Virginia provisions should also be determined by those same traditional standards propounded in

Rinaldi v. Yeager and reaffirmed so clearly in *McDonald*.

III. The History And Experience of Washington with its Supermajority Vote Rules is Relevant to Assist the Court in Determining Their Rational Relation to the State Objective to Limit Property Taxation As A Means of Raising Governmental Revenue.

The supermajority vote requirements for the approval of taxing measures at issue in this case do not touch what has been termed a fundamental right of citizens. Their constitutional validity, therefore, is determined by whether they are rationally related to the achievement of a permissible governmental objective. This determination must necessarily involve consideration by the Court of the purpose and background of such supermajority provisions. Because of the similarity of Washington's 40-mill laws to the West Virginia provisions, we believe a concise analysis and review of this state's experience under its laws would be of material assistance to the Court.

A. Special Levies Under Amendment 17

Amendment 17 to the Washington Constitution, prescribing a 40-mill limit on property taxation but permitting levies in excess of this limit if approved by a 60% affirmative vote, was adopted at the gen-

eral election November 7, 1944, by a vote of 357,488 in favor to 179,273 opposed. This adoption culminated an uninterrupted series of enactments by initiative and referendum, all of which embodied the requirement of a 60% affirmative vote before a 40-mill limit could be exceeded. The votes on the measures were as follows:

		For	*Against*	*Percent Affirmative*
1932	(Initiative)	303,384	190,619	61.4%
1934	"	219,635	192,168	53.3%
1936	"	417,641	120,478	77.6%
1938	"	340,296	149,534	69.5%
1940	(Referendum)	390,639	149,843	72.3%
1942	"	252,431	75,540	77.0%

Through these direct enactments the people of the state of Washington expressed very forceably their policy decision to shift the principal tax reliance in Washington from property to other sources. The passage of these initiatives and referenda, and ultimately of Amendment 17, was motivated by facts and events which had a profound effect on Washington citizens and which convinced them of the need to place a rational ceiling on the property tax as a means of raising governmental revenue. Professor Harsch, in *The Washington Tax System —How It Grew*, 39 Wash. L.Rev. 944 (1965), states:

> "The complaints of owners of real property and those owners of personal property which did not escape listing on the tax rolls grew more and more audible during the 'twenties'. These complaints were against both the

obvious unevenness in the distribution of the property tax load among property owners and the high rates of tax levy in many parts of the state.

* * * *

"Adoption of amendment fourteen [requiring that taxation of property of the same class be levied uniformly—approved by voters in 1930], however, did not insure that property owners would obtain the relief they desired from high property taxes. There existed an increasing belief that other sources of revenue should be utilized to meet the rising costs of both state and local government units, costs which were unquestionably due to the popular demand for more and better highways, more and better schools, increased health and sanitation facilities, and more parks, playgrounds, and recreational facilities. In addition, the nationwide economic depression which followed the break in the business boom of the middle and late 1920's added businessmen and farmers as well as homeowners to the property owners who demanded relief from the unreasonable and inequitable burden which they felt the existing tax structure placed upon them" *Id* at 956, 958.

In response to the passage of the 40 mill initiative measures the Washington Legislature in 1933 and 1935 dramatically changed the entire tax structure of the state. For the first time a sales tax was enacted and new excise taxes were imposed. Chapter 191, Laws of 1933; Chapter 57, Laws of 1933, Ex. Sess.; Chapter 180, Laws of 1935. These changes, combined with the 40 mill limit, greatly reduced the state's relative dependence on property taxes. For a

time this new taxing system resulted in a reduction in the dollar amount of property taxes collected. Dr. John F. Sly, then Director of Princeton Surveys, stated in the first of his series of reports entitled *Tax Developments in Washington State—How We Got This Way*, published in 1956 by the Washington State Research Council:

> "The impact of the Forty-mill Law was, as it was expected to be, tremendous. In the first full year of its application (1934), property tax levies fell to $54 million. Five years later (1938), they had fallen to $42 million. Barred from income taxes, heavily restricted on property taxes, there was only one way to go—excises and sales. 'Replacements' were hastily provided by the Legislature. . . .
>
> "By 1935, however, the Legislature had pretty well rounded out its replacement program. It was composed of the so-called business and occupation tax—a classified gross sales tax; a retail (2 per cent) sales and use tax; a tax on fuel oil; a tax on admissions to places of amusement; a tax on cigarettes; a tax on liquor; and a tax on conveyances. This gave Washington one of the broadest programs of state sales and excise taxes in the country. The effect of this program on Washington tax policy and tax structure was clear and dramatic:
>
> "From 1931 to 1939 total property taxes declined from $80 million to $41.6 million—from 80 per cent to 42 per cent of total state and local revenues.
>
> "Total state revenues (except property) increased from $20.5 million in 1931 to $57.3 million in 1939—from 20.6 per cent to 58 per cent of total state and local revenues.

"In 1931, some two-thirds of all revenues were collected and spent by local governmental agencies; by 1939, the State was collecting almost two-thirds of all revenues and local governmental agencies about one-third.

"This was the beginning of what was known as 'replacement' on the tax side, and 'state aid' on the service side—particularly for schools, highways, and welfare." *Id* at 10-11.

The popular decision to limit property taxes was accompanied by a concurrent popular decision to provide a procedure whereunder the affected voters of a taxing district could permit the limit to be exceeded. But if the limit was to succeed in shifting a significant portion of the tax burden away from property, the people believed the limit must be one which could not be exceeded automatically but only upon a strong showing to the voters of a taxing district that the requested excess property taxation was necessary. Otherwise the purpose of relieving the burden on the property taxpayer could be easily frustrated. The people conclued that at any special election in which a 60% affirmative vote could be obtained, the objective of this part of the 40 mill law —to permit excess levies only on a clear showing of need by the taxing district—would have been convincingly met in the minds of the voters. This policy decision made directly by the people on the numerous times they approved the 40 mill limit was, simply stated, that a requirement of a 60% affirmance for

excess levies would prevent the wholesale circumvention of the desired limit on property taxes.

It is significant to observe that Amendment 17 could itself be amended by a majority vote of the people. They have not chosen to amend it. In fact, several liberalizing amendments have recently been rejected which would have permitted an approval granted at one special election to apply to excess levies for more than one year. The following is a summary of these measures and the popular vote rejecting them:

	For	*Against*	*Percent Against*
SHJR 4, Laws of 1957, pg 1302 (Submitted November 1958)	293,386	483,165	62.6%
SSJR 1, Laws of 1961, pg 2749 (Submitted November 1962)	249,489	597,928	70.6%
SJR 23 (Submitted November 1968)	407,248	625,016	60.5%

This refusal of the people to alter the rules established by them for authorizing excess levy assessments indicates that the maintenance of stringent requirements for permitting increases in property tax assessments above the 40 mill limit remains of prime importance to the Washington voter.

In summary, the preceding historical information demonstrates that the 40 mill laws set the tax structure of Washington on a completely new course. Property taxes immediately declined as the major source of revenue in Washington and were replaced

by alternate sources of governmental moneys. The original options of the people in developing the laws to accomplish this change were to adopt an inflexible limit or to provide a procedure for exceeding the limit only upon a strong showing that higher property taxation was required. The option they selected bears a rational relation to the achievement of the desired objective.

B. RESTRICTIONS ON INCURRENCE OF BONDED DEBT —AMENDMENT 27

Article VIII, Section 6, a part of the original Washington Constitution adopted in 1889, and Amendment 27, adopted in 1952, limit local units of government to an indebtedness of specified percentages of the value of taxable real property within a taxing district, but provide that certain indebtedness in excess of these percentages may be incurred with the approval of a 60% majority vote of the voters in the affected district. These constitutional provisions are a reflection of the decision of Washington citizens to maintain a tight rein on proposals of taxing districts to encumber property for long periods of time by bonding measures adopted at a single election. Like the 40 mill laws, the 60% affirmative vote requirement of these provisions was designed to require taxing districts to persuade more than a mere

majority of the necessity for incurring long-term debt.

The motivation for this policy decision is understandable. In most functions of government, action approved by a majority today can be amended or repealed by a majority tomorrow if facts and circumstances have changed or if the enactment has proved to be unwise. The authorization and incurrence of bonded indebtedness by components of state government, however, irrevocably encumbers property in the taxing jurisdiction for years or even decades. Because of the enduring effect of such a vote, the people, in framing this constitutional requirement, expressed their belief that more than a mere majority of today's voters ought to be persuaded of the merits of the proposal. The supermajority vote requirement is designed to require a persuasive showing of need in order to protect later voters who will be affected by the vote but who will be powerless to alter its effect on their vital interests.

CONCLUSION

For the aforestated reasons, the State of Washington, by its Attorney General, and G. Keith Grim, as *amici curiae* respectfully urge this Court to adopt the position of the petitioners herein, to reverse the decision of the Supreme Court of Appeals of West Virginia, and to declare the supermajority vote provisions of the West Virginia Constitution to be valid and constitutional.

Respectfully submitted,

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